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No. 948.

In the Supreme Court of the United States.

OCTOBER TERM, 1914.

A. D. DARLING, APPELLANT,

vs.

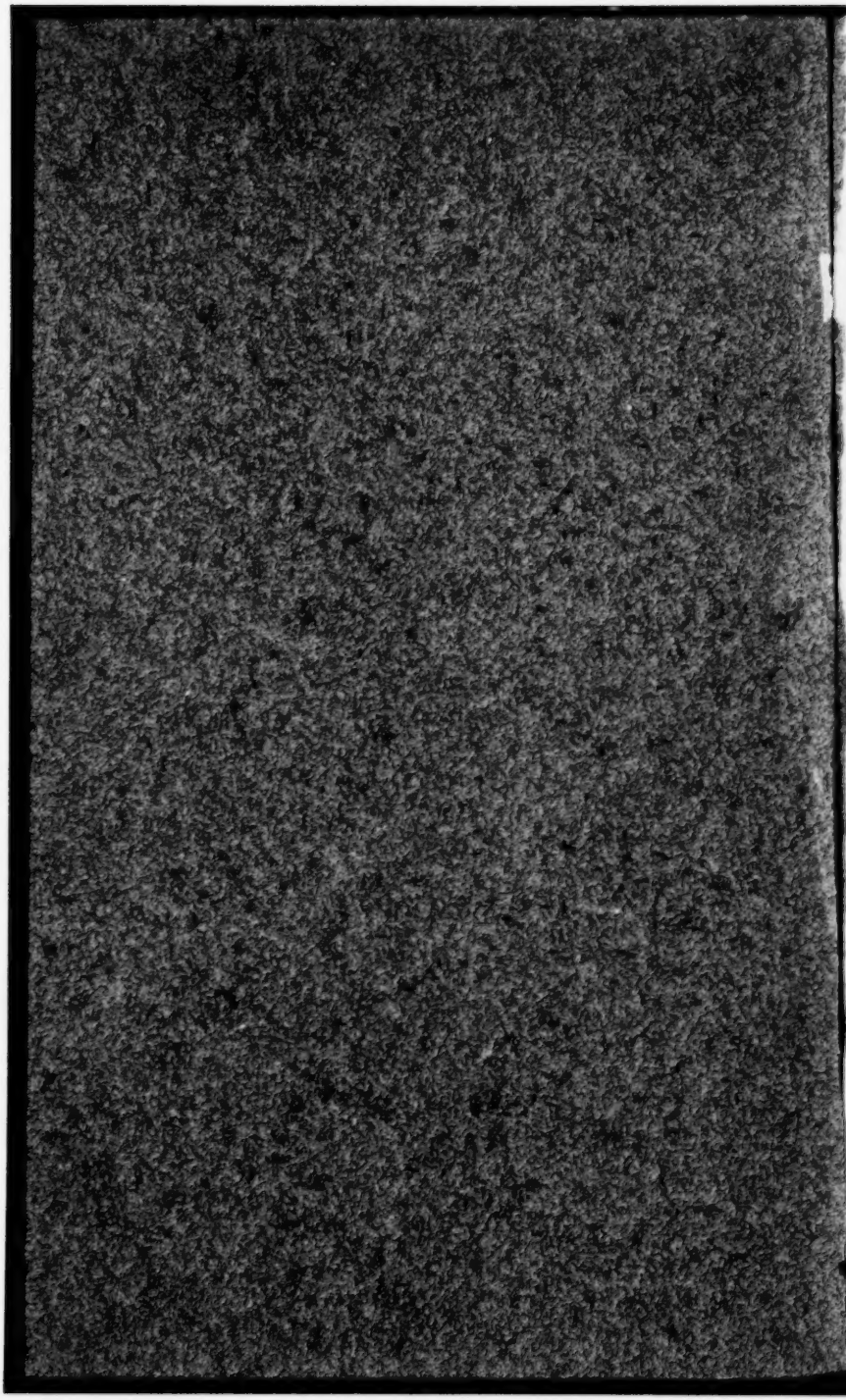
MARTHA M. CHADDOCK, ROBT. T. ADDIE, AND J. B. ADDIE, HIS HUSBAND, AND WILLIAM SMITH.

Appeal from the United States Circuit Court of Appeals for the Ninth Circuit.

BRIEF FOR APPELLEES.

L. F. COAN, Lakeview, Oregon,
F. M. SAXTON, Nome, Alaska,
WM. H. KING, Ontario, Oregon,
Attorneys for Appellees.

MARTHA B. CHADDOCK, *et al.*,



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In the Supreme Court of the United States.

OCTOBER TERM, 1914.

A. D. DANIELS, APPELLANT,

v.

MARTHA M. CRADDOCK, RUBY I. AUTEN, AND J. B. AUTEN, HER HUSBAND, AND WILLIAM SHIRK.

No. 248.

BRIEF FOR APPELLEES.

STATEMENT OF THE CASE.

The decision of the court from which this appeal is taken involves about 15 suits, in all of which practically the same legal points are presented. The object of these suits appears to be to obtain a decree declaring defendants to be holders of the legal title to their respective lands as trustees, respectively, for the complainant. Demurrers were filed to and by Judge Bean, presiding at the trial court, sustained. Decrees were accordingly rendered dismissing the bills, from which decree appeals were taken to the

Court of Appeals and by the Court of Appeals affirmed; hence this appeal.

The averments in each of the bills are substantially the same, and *in substance*, are as follows:

That on and prior to April 12, 1902, Edward B. Perrin and the Aztec Land & Cattle Company, Limited, a corporation, as predecessor in interest of appellant, each owned certain lands in fee simple in the territory of Arizona;

That on that date those lands were included within the limits of the San Francisco Mountains Forest Reserves, and that thereafter, on February 2, 1904, under the provisions of the act of Congress of June 4, 1897 (30 Stat. 34, c. 2 (U. S. Comp. St. 1901, p. 1541)), the said landowners relinquished and conveyed to the United States their interest in said lands, and on February 8, 1904, they made lieu selections of certain lands in Klamath County, Oregon, for the benefit of the complainant;

That the selections were perfected by presenting the recorded deeds, together with a full, true, and correct abstract of title disclosing the selectors to be the owners in fee simple of the lands relinquished;

That on June 28, 1902, Oregon filed upon the lands thus selected certain instruments, purporting to be school indemnity lists, and before the approval of the lists had sold the land to the complainant, but that thereafter, owing to the invalid character of the base lands tendered in said lists, the lists were held for

cancellation, and in March and August, 1904, were cancelled and relinquishments thereof filed on behalf of Oregon;

That, prior to such cancellation, Oregon, acting through the officers of the State Land Board, sold to various bona fide purchasers for value, the timber lands upon which the school indemnity lists had been filed, and that appellant in good faith purchased said lands from the State of Oregon;

That, after discovering the State had no right, title or interest in the lands thus conveyed, the forest lieu selections already referred to were made for the purpose of protecting complainant's interest in said lands;

That, at the time of making their selections, the selectors filed relinquishments from the State of Oregon of any rights it might have acquired by virtue of the school indemnity lists so filed by it;

That, after making such lieu selections and filing such relinquishments, the officers of the land office at Lakeview, Oregon, after having allowed other entries to be made on the lands so selected by homestead, timber and stone applications for the lands rejected the selections so made by the complainant's predecessors in interest;

That, upon appeal to the Commissioner of the General Land Office, the action of the register and receiver at Lakeview, Oregon, was affirmed;

That the Commissioner advanced as a further reason for the rejection that at the time when the lieu selections were presented to the Commissioner the said indemnity school selections had not been cancelled or relinquished;

That the State of Oregon executed relinquishments and the same were filed in the land office, February 10, 1904;

That the relinquishments were forwarded to the Commissioner of the Land Office, March 7, 1904, whereupon he advised the register and receiver at Lakeview, Oregon, that the relinquishments had been received, and directed them to make due notation that the lists were cancelled, "leaving the lands open to entry by the first legal applicants;"

That, thereafter the appellees, Martha M. Craddock, Ruby I. Auten, and J. B. Auten, her husband, and William Shirk, made application for the lands claimed by each of them respectively, at the local land office, and their and each of their filings were accepted;

That thereafter various proceedings were had in the Land Department, concerning the lands so entered, and on August 10, 1907, the Secretary of the Interior instructed the Commissioner of the General Land Office to order a hearing in order that a full investigation might be had of the whole matter;

That, upon the hearing, the local land office found that the lands had been entered by bona fide settlers

or purchasers, to many of whom certificates, and in some instances, patents, had issued;

That the register and receiver accordingly recommended that such entries be allowed to remain, and the Secretary of the Interior finally so decided on February 17, 1910, holding that the greater equities were with the homestead and stone and timber entrymen, and that in the discretion of the Secretary, such entries might be executed against the right of script applications, and said:

> "It matters not if Daniels' application was in all respects regular, and might have been allowed when presented; yet it was within the competency of the Land Department to dispose of the said lands to other persons, and, having done so, Daniels will not now be heard to question the correctness of that disposition."

POINTS AND AUTHORITIES.

1. At most, the Act of June 4, 1897, constitutes but an offer upon the part of the government to exchange any of its "vacant land, open to settlement" for an equal area of patented land in a forest reservation. "Uncle Sam" merely said, "I have some land to sell—make your offer. If it suits me I will accept, but I must 'approve.' If some of my other wards make an offer and I should decide to accept, you will be down and out and you will have to make another selection, and keep selecting until I am satisfied, and when I am I will approve. It's my land and I will be the judge as to when to approve. You must take your chances; otherwise, otherwise."

2. The Land Department has power and authority to adopt, and has adopted, rules and regulations governing the procedure in relinquishing lands within a reservation, and the selection of other lands in lieu thereof, of which the courts will take judicial notice.

Cosmos Exploration Co. v. *Gray Eagle Oil Co.*, 190 U. S. 301; 23 Sup. Ct. 692; 47 Law ed. 1064.

3. An executive withdrawal of lands from entry or selection is valid and an entry or selection thereof during the period covered by the withdrawal is in-

sufficient to give the entryman or selector any vested or rights therein.

United States v. *The Midwest Oil Company*, — U. S. — decided Feb. 23, 1915.

4. "That a proposal to exchange land within a forest reservation for lands outside may be withdrawn before acceptance is an obvious proposition."

Roughton v. *Knight*, 219 U. S. 544, 55 Law ed. 326, 8.

5. To take advantage of the proposal contained in this Act, the applicant must select the land he wishes to receive in lieu, and file a sufficient relinquishment of land within a forest reserve. *Manifestly there must be an acceptance of the relinquishment by some one authorized to decide upon its sufficiency, and an assent to the particular selection made in lieu.*

Roughton v. *Knight*, 219 U. S. 544; 55 Law ed. 326, 327.

6. Before one can acquire an equitable title to lands selected by him in lieu of lands relinquished in a forest reservation under Act of June 4, 1897, his relinquishment and lieu selection must be approved by some officer authorized to make such approval.

Cosmos Exploration Co. v. *Gray Eagle Oil Co.*, 190 U. S. 301; 47 Law ed. 1064, 1072.

7. A lieu selector under the Act of June 4, 1897, must accompany his application by a non-mineral and non-occupancy affidavit.

XXX L. D. 570, 580.

ARGUMENT.

We have always acted on the assumption that a "brief" is intended to *aid rather than to confuse* the court, and that it is inadvisable to write "text-books" on the propositions of law involved in a case presented to an appellate court, more especially to the highest court of the land. Acting upon this theory we will, as briefly as is within our reach, state our views on the points presented by this appeal.

There are here presented about 15 cases involving practically the same points of law in each case. In one of these cases, *Daniels* v. *Wagner* (194 Fed. 973), *Judge Bean*, of the Federal Court, and formerly chief justice of the Oregon Supreme Court, rendered a written opinion. As we view it, the real points presented can not be more concisely and logically stated than as given by Judge Bean in this opinion. As a part of this brief, we will therefore quote from his opinion upon the decisive points in this case, as follows:

> "This is a suit for a decree declaring the defendant to hold the legal title to certain real property in section 2, township 37 S., range 10 E., in trust for the plaintiff. The facts as they appear from the bill, in brief, are that on June 4, 1897, Congress passed an act providing, among other things:
>
> "'That in cases in which a tract covered by an unperfected bona fide claim or by a patent is included within the limits of a public forest reservation, the settler or owner thereof may, if

he desires to do so, relinquish the tract to the government and may select in lieu thereof a tract of vacant land open to settlement, not exceeding in area the tract covered by his claim or patent.' Act June 4, 1897, c. 2, 30 Stat. 36 (U. S. Comp. St. 1901, p. 1541).

"By virtue of the provisions of this law there was filed on February 8, 1904, in the local land office, for and on behalf on the plaintiff, deeds by the owners of certain lands in the San Francisco Mountain forest reserve, accompanied by the requisite abstract of title, conveying such lands to the United States, and at the same time applications were made to select in lieu thereof the land in controversy; the same being at the time vacant, unappropriated lands of the United States, and open to settlement. Before the applications for exchange had been accepted or acted upon by the local land office, or by it forwarded to or considered by the Commissioner of the General Land Office, the defendant applied to enter the lands so selected under the Timber and Stone Act (Act June 3, 1878, c. 151, 20 Stat. 89 [U. S. Comp. St. 1901, p. 154]). Subsequently such proceedings were had in the Land Department that the applications were rejected, the entry of the defendant approved, and patent issued to him.

"The plaintiff now claims that by filing the relinquishments in the local land office, and designating the tracts desired to be selected in lieu of that relinquished, he acquired a vested right or interest in the land so selected, which could not be impaired by subsequent applica-

tions to purchase the same under the Timber and Stone Act, and he seeks to invoke the rule applicable to homestead and pre-emption entries. I do not think the cases are at all analogous. The homestead and pre-emption laws were intended for the benefit of actual settlers, and so tender have the courts been of the rights of such settlers that, applying the doctrine that equity will consider that as done which ought to have been done, they have held that when a qualified entryman enters upon public lands open to settlement under the homestead or pre-emption laws, with the intent of acquiring title thereto, he has a vested right therein, of which he can only be deprived by his failure to comply with the conditions of the law, and that one to whom the Land Department may subsequently convey the title will be decreed to hold it in trust for the entryman. *Lytle et al.* v. *Arkansas*, 9 How. 314, 13 Law ed. 153; *Nelson* v. *N. P.*, 188 U. S. 108, 23 Sup. Ct. 302, 47 Law ed. 406.

"The Act of 1897, under which plaintiff claims, however, merely signifies the willingness of the government to exchange vacant land open to settlement for an equal area of land within the limits of a forest reservation covered by a bona fide claim or patent, and no rights are acquired by the selector until his application for the exchange is approved. No method of procedure for effecting the exchange is provided by law. The general administration of the forestry reservation acts, however, and the adjudication of the various questions arising therein, are vested in the Land Department. It has power

and authority to adopt, and has adopted, rules and regulations governing the procedure in relinquishing lands within a reservation and the selection of other lands in lieu thereof, of which the courts will take judicial knowledge. *Cosmos Exploration Co.* v. *Gray Eagle Oil Co.*, 190 U. S. 301, 23 Sup. Ct. 692, 47 Law ed. 1064. By the rules and regulations so formulated, one desiring to relinquish lands and select other lands in lieu thereof, where final certificate or patent has issued, is required to make a quit-claim deed to the United States for the land offered in exchange, have it recorded in the proper county, and file the same (accompanied by an abstract of title duly authenticated, showing a chain of title from the government back to the United States, to the property offered) in the local land office, and at the same time designate the particular tract which he desires in lieu of that relinquished.

"'All applications for change of entry or settlement under this law must be forwarded by the local land officers to the Commissioner of the General Land Office for consideration, together with a report as to the status of the land applied for.' *William S. Tevis*, 29 Land Dec. Dep. Int. 575.

"There is some language of Judge Ross in *Olive L. & D. Co.* v. *Olmstead* (C. C.) 103 Fed. 568, which is susceptible of the construction that the selector of lands under the Act of 1897 becomes the equitable owner thereof upon the filing of his deed of relinquishment and notice of selection in the local land office and the acceptance

thereof by such office; but in subsequent case of the *Cosmos Exploration Co.* v. *Gray Eagle Oil Co.* (C. C.) 104 Fed. 20, the learned judge explains that the Olive Case was decided without reference to the rules of the Land Department regulating the procedure of applicants for exchange of lands under the Act of 1897, and in the latter case he holds that under the rules so promulgated the local land office has no authority to approve a selection, but is required to refer the question to the General Land Office for its consideration, and that the selector has no vested interest in the land selected by him until the application is approved by the Land Department.

"This ruling was affirmed by the Court of Appeals (*Cosmos* v. *Gray Eagle*, 112 Fed. 4, 50 C. C. A. 79, 61 L. R. A. 230), and by the Supreme Court (*Cosmos* v. *Gray Eagle*, 190 U. S. 303, 23 Sup. Ct. 692, 24 Sup. Ct. 860, 47 Law ed. 1064). In the latter case the court said that the complete equitable title of the selector is not 'made out and cannot exist until a favorable decision by that department (General Land Office) has been made regarding the sufficiency' of the proof and his right to the selected land, and that 'there must be a decision made somewhere regarding the rights asserted by the selector of the land under the act before complete equitable title to the land can exist; the mere filing of papers cannot create such a title; the applicant must comply with and conform to the statute, and the selector cannot decide the

question for himself;' and that authority to determine whether the selector has complied with the provisions of the act and the regulations of the department is not vested in the local land officers, but in the Commissioner of the General Land Office, and, until he has approved the application, the selector is not vested with the equitable title to the land he assumes to select.

"Under this rule, it seems to me that the plaintiff acquires no title or right to the land selected by him by the mere filing of his application, and that it was within the power and jurisdiction of the Land Department to reject the same and award the land to a subsequent entryman under the Timber and Stone Act, and as a consequence that the plaintiff is not entitled to the relief prayed for in his bill.

"The demurrer will be sustained."

An appeal was taken from this decision to the United States Court of Appeals. Remembering that it is our duty to aid the court, not only in deciding the points of law involved, but to save labor as well, we will here quote verbatim from the decision of the court of appeals on the subject presented. Taking together the very pointed decision of Judge Bean and that of Judge Gilbert for the appellate court, we deem it unnecessary to say much in defense of our position, in addition to these two very able opinions. In lieu, therefore, of what might be an extended argument on

our part, we quote from Judge Gilbert as follows: (205 Fed. 235):

> "The appellant contends that by virtue of his offer to select the lands in question, and the tender, in exchange therefor of a deed and abstract of title to the lands offered for surrender, he thereby became the equitable owner of the lands so sought to be selected, notwithstanding that his selection was rejected by the officers of the local land office, and that their rejection was affirmed by the Secretary of the Interior, and that the patent having issued to the appellees, when in equity and good conscience, and according to law, it should have gone to the appellant the court should convert the holder of the legal title into a trustee for the appellant, and compel conveyance of the legal title to him.
>
> "In considering in the light of the adjudications the question here presented, it is essential to bear in mind the distinction between the right acquired by a railroad company, under a congressional grant of lands to aid the construction of a railroad, to select within the indemnity limits lands in lieu of those which are lost in the place limits, and the right of a lieu land selector under the act of June 4, 1897. The former is a substantial right in the lands lying in the indemnity limits, given in consideration of the construction of a railroad, and is confined to specific lands within certain boundaries which are defined in the grant. It is a vested right, of which the grantee could not be deprived, by an Act of

Congress or by other authority. In *Weyerhaeuser* v. *Hoyt*, 219 U. S. 387, 31 Sup. Ct. 303, 55 Law ed. 258, the court declared that it was the intention of Congress in making such a grant 'to confer a substantial right to land within the indemnity limits in lieu of land lost within the place limits.' The right of selection of lieu land given under the Act of June 4, 1897, however, is in the first instance but an offer by the government to exchange lands. It is based upon no valuable consideration actually received. It attaches to no specific lands, nor to lands within any defined limits. It does not attach upon the mere presentation of the requisite papers. It attaches only when the authorized officers of the government accept the offer to exchange. Nor is it true that the filing of the lieu selection papers and the acceptance of the same by the local land office segregates the land upon which the filing is made, so as to cut off intervening and subsequent rights as against the lieu selectors. In *Roughton* v. *Knight*, 219 U. S. 537–547, 31 Sup. Ct. 297, 299 (55 Law ed. 326), in construing the Act of June 4, 1897, the court said:

"'Manifestly there must be an acceptance of the relinquishment by some one authorized to decide upon its sufficiency, and an assent to the particular selection made in lieu.'

"In *Cosmos Exploration Co.* v. *Gray Eagle Oil Co.*, 190 U. S. 310, 23 Sup. Ct. 697, 47 Law ed. 1064, lieu land had been selected under the Act of June 4, 1897. The selector complied with the provisions of the act. His selection was received

and accepted, and entered on the records of the local land office. At that time there was no adverse claim. Before the issuance of a patent, the selector's grantee brought a suit against the defendants, who had entered the land as a mineral claim; he claiming that his grantor had become vested with the complete equitable title to the land so selected, and had become entitled to receive a patent. The court held that it had no jurisdiction, prior to the issuance of the patent to determine who was entitled to receive it, and that under the Act of June 4, 1897, the officers of the local land office had no authority to decide whether the selector had complied with the provisions of the act; that authority being vested in the Commissioner of the General Land Office. The court said:

"'But even the complete equitable title asserted by a complainant must, as it would seem, be based upon the alleged right of the local land officers to accept the deed and approve the selection, even though such approval may be thereafter the subject of a review in the nature of an appeal from the action of the local officers. There must be a decision made somewhere regarding the rights asserted by the sleector of land under the act, before a complete equitable title to the land can exist. The mere filing of papers can not create such title. The application must comply with and conform to the statute, and the selector can not decide the question for himself. We do not see how it can be successfully maintained that without any decision by any official representing the government, and by merely filing the deed relinquishing to the government a tract of forest reserve land, and assuming to select a similar area

of vacant land open to settlement, the selector has thereby acquired a complete equitable title to the selected land.'

"It is urged that this language of the court is dictum, but we do not so regard it. It contains the reasoning of the court in determining the nature of the rights of the complainant in that case. But if, indeed, it is true that the expression of such views was unnecessary to the determination of the case which was before the court, the language used sets forth the mature and unanimous judgment of the members of that court on the question of law which is involved in the case at bar, and we deem it controlling in the decision of the present case.

"Nor do we find ground to sustain the appellant's contention that the views of the court so expressed in the Cosmos Exploration Co. Case have been modified by the decision in *Weyerhaeuser* v. *Hoyt*, 219 U. S. 380, 31 Sup. Ct. 300, 55 Law ed. 258. That was a case which involved the right of a railroad company to select lands within the indemnity limits of its grant. The court held that selections of lieu lands filed with the Secretary of the Interior excluded the right of others to appropriate the lands embraced therein pending action by the Secretary, and that the railroad company's rights to such lieu lands so selected were superior to those of a purchaser under the Timber and Stone Act (Act June 3, 1878, c. 151, 20 Stat. 89 [U. S. Comp. St. 1901, p. 1545]) who filed pending final decision by the Secretary, and that the final decision by

the Secretary related back to the date of the original selections. Prior to that time, the court had said, in *New Orleans Pacific Ry. Co.* v. *Parker* 143 U. S. 57, 12 Sup. Ct. 369, 36 Law ed. 66:

"'As to lands within the indemnity limits, it has always been held that no title is acquired until the specific parcels have been selected by the grantee and approved by the Secretary of the Interior.'

"The same was held in *Humbird* v. *Avery*, 195 U. S. 507 25 Sup. Ct. 123, 49 L. Ed. 286. In *Wisconsin Central Ry. Co.* v. *Price County*, 133 U. S. 496, 512, 10 Sup. Ct. 341, 347 (33 Law ed. 687), the court said:

"'Until the selections were approved there were no selections in fact, only preliminary proceedings taken for that purpose; and the indemnity lands remained unaffected in their title.'

"And in *Sjoli* v. *Dreschel*, 199 U. S. 565, 26 Sup. Ct. 155, 50 Law ed. 311, the court held it to be established doctrine:

"'That no rights to lands within indemnity limits will attach in favor of the railroad company until after selections made by it with the approval of the Secretary of the Interior; that, up to the time such approval is given, lands within indemnity limits, although embraced by the company's list of selections, are subject to be disposed of by the United States or to be settled upon and occupied under the preëmption and homestead laws of the United States; and that the Secretary of the Interior has no authority to withdraw from sale or settlement lands that are within indemnity limits which have not been previously selected, with his approval to supply deficiencies within the place limits of the company's road.'

"*In the Weyerhaeuser Case, the court distinguished the Sjoli Case* by saying that it belonged to a class of cases in which there was no question of right by relation involved, and that the general language which we have quoted from the opinion was to be considered in view of the questions which were presented in that case, and that to apply it in the Weyerhaeuser Case would be in effect to destroy the indemnity provisions of the granting act. No reference was made to the decision in the Cosmos Exploration Company Case, and this was evidently for the reason that the language of the court in that case was deemed to be applicable solely to the right of selection granted by the Act of June 4, 1897, and that the court recognized and intended to reaffirm the vital distinction which it had found between such rights and the rights of a selector of indemnity lands under a grant to a railway company in aid of the construction of its road. *Stalker* v. *Oregon Short Line*, 225 U. S. 142, 32 Sup. Ct. 636, 56 Law ed. 1027, is in line with *Weyerhaeuser* v. *Hoyt*, and so is *Svor* v. *Morris*, 227 U. S. 524, 33 Sup. Ct. 385, 57 Law ed. —. We consider the decision in the Cosmos Exploration Company Case authority for sustaining the decree of the court below. But there is additional ground for sustaining it in the fact that, at the time when the appellant's selection was initiated on February 8, 1904, the lands involved herein appeared upon the records of the local land office as selected by the state of Oregon by certain school indemnity lists, and that those lists were not relinquished

by the state until February 10, 1904. This sufficiently appears from the decision of the Secretary of the Interior which is made an exhibit to the bill and is controlling in so far as it varies from the allegations of the bill. *Greenameyer* v. *Coate*, 212 U. S. 434, 443, 29 Sup. Ct. 345, 53 Law ed. 587.

"The decree in each of the 16 suits, Nos. 2,212 to 2,227, is affirmed."

We question the sufficiency of the allegations of the amended bill of complaint in the attempt to comply with the Act of June 4, 1897, in that there is nothing to show that the selector at the time of filing his selection of the land in controversy, accompanied his selection with a *non-mineral* and a non-occupancy affidavit. The averment of the amended complaint is (Paragraph VII, Transcript p. 5) that, "and on the 8th day of February, 1904, complainant filed with the Register and Receiver of the United States Land Office at Lakeview, Oregon, the said deed so recorded, together with a full, true and correct abstract of title of the lands so relinquished, duly certified as such by the county recorder of the county in which the lands are situated, which abstract of title showed it to be the owner in fee simple of said lands, free and clear of any lien or incumbrance, immediately prior to the time the deed to the United States was recorded, and thereupon and at the same time selected in lieu of said lands so relin-

quished the E½ of NE¼ of Sec. 24, Tp. 37, S. R. 10 E. W. M." etc.

The Commissioner of the General Land Office would not have been justified in approving this lieu selection (which he did not do) without a showing that the land selected was non-mineral in character and not actually occupied by some other claimant.

In *Gray Oil Co.* v. *Clark*, XXX L. D. 570, 580, it was argued by the selector that no non-mineral or non-occupancy affidavit was required by the rules or regulations of the Land Department in force at the time the selection was made. In answer to this argument, Secretary Hitchcock says: "This contention cannot be sustained. The form of application prepared by your office for selections of land in lieu of tracts covered by patent in a forest reserve and specifically adopted as form 4–643 in the regulations of May 9, 1899 (28 L. D. 521, 524) and December 18, 1899 (29 L. D. 391, 394) requires the selector to accompany his application with an affidavit showing the land selected to be *non*-mineral in character and un-occupied. It is thus clearly made incumbent upon one seeking to take advantage of the offer made by this law to establish the fact that the land he selects is of the character contemplated by the law. Until this fact is established his proffer of exchange is not complete." It appearing to Secretary Hitchcock in that case that subsequent to the time of filing the lieu selection, other claimants' rights had intervened, he rejected the lieu selection.

The allegations of the amended bill of complaint show that when the selector filed his deed of relinquishment and abstract and selection of the land in controversy in the local land office, the Register and Receiver thereof did not forward the same to the Commissioner of the General Land Office for his consideration, together with their report upon the land selected, as should have been done under Rule No. 18 (XXX L. D. 589, 592), but assumed jurisdiction within themselves and proceeded to reject said lieu selection; that the selector appealed from the decision and this was followed by successive appeals and hearings in the Land Department, covering a period of about six years, finally culminating in the decision of the Hon. Franklin Pierce, First Assistant Secretary of the Interior, adverse to appellant, set out as "Ex. A." to the amended bill of complaint herein.

Was Rule No. 18 ever complied with? We think not. On page 31 of the transcript of the record in this case we find the following as a part of the decision of the First Assistant Secretary of the Interior, to-wit:

> "Under existing regulations, it was the duty of the Register and Receiver to forward these applications, and these relinquishments without action for the consideration and disposition of your office. This, however, it has been seen, was not done."

This finding of fact was made at the end of six years' litigation before the Land Department and may have been the controlling fact in inducing the said First Assistant Secretary to reject said lieu selection in his said opinion, although he says further on that:

> "It is believed that these applications might have been allowed, not as a matter of right, but in the discretion of the Secretary of the Interior," etc.

It is true that said amended bill of complaint shows that said lieu selection was before the Hon. Commissioner of the General Land Office at least three times on appeal during said six years of litigation, but in each of said cases the General Land Office was acting as an appellate tribunal under the appellate land office practice and was not a tribunal of original jurisdiction under said Rule No. 18 aforesaid.

Hence said Rule No. 18 has never been complied with, which is a conclusion in conformity with the finding aforesaid of the Hon. the First Assistant Secretary.

Since the Hon. Commissioner of the General Land Office has *original* jurisdiction in the first instance to pass upon a lieu land selection, and since this has not at any time been done in reference to the lieu selection involved in this case, it follows that no equitable title to the land in controversy has been

acquired by appellant, following Mr. Justice Peckham's opinion in *Cosmos Exploration Co.* v. *Gray Eagle Oil Co.* (190 U. S. 301, 47 Law ed. 1064, 1072), in which he says:

> "Taking into consideration, however, the fact that the statute did not vest the local officers with the right to decide upon the question of a compliance with its terms, and the further fact that the Land Department had adopted Rule No. 18, above referred to, which provides for the forwarding of all applications for change of entry or settlement to the Commissioner of the General Land Office for his consideration, together with a report as to the status of the tract applied for, we must conclude that the action of the local officers did not, as it could not, amount to a decision upon the application of the selector, so that he became vested with the equitable title to the land he assumed to select. It is certain, as we have already remarked, there must be some decision upon that question before any equitable title can be claimed—some decision by an officer authorized to make it. Under the rule above cited, that decision has not been made. The General Land Office has (so far as this record shows) come to no conclusion in regard to it."

Further on in the same opinion it is observed:

> "What may be the decision of the Land Department upon these questions in this case can not be known, but, until the various questions of law and fact have been determined by that

> department in favor of the complainant, it can not be said that it has a complete equitable title to the land selected."

The gist of the claim of counsel for appellant is that their client has complied with the requirements of the Act of June 4, 1897, and the regulations promulgated by the Land Department thereunder (which we do not concede) and that his lieu land selection has been approved by the Land Department as to the sufficiency and regularity of this application, although rejected through an erroneous application of law (all of which we have hereinbefore shown to the contrary) and that by an application of the "doctrine of relation" appellant has a vested right in the land in controversy as of the date of the attempted lieu selection thereof, to-wit: February 8, 1904.

If we should concede counsel's assumption of facts, we do not think that their conclusions would follow. Their argument is based largely upon *Weyerhaeuser* v. *Hoyt*, 219 U. S. 380, which, it should be observed, deals with an indemnity selection under the Northern Pacific Railway grant. This grant was a grant *in præsenti* in the nature of a float, which became fixed and title passed when selection was made and such selection approved by the Secretary of the Interior. By such a grant the government recognized a debt or obligation to the railroad company and proceeded to satisfy the same by a *present grant of lands which needed only to be identified for the title to pass and the transaction to be closed.* Recognizing this obligation

on the part of the government and the narrow limits within which the selection must be made, it is not unreasonable or unequitable that our courts should hold in such a case that the doctrine of relation applies but even in such a case the dissenting opinion of Mr. Justice Harlan and Mr. Justice Day in *Weyerhaeuser* v. *Hoyt*, supra, shows that the opposite view is without neither reason nor precedent. While the doctrine of "relation" is a *legal fiction*, it is of equitable origin and is invoked by the courts solely for the purposes of justice and in aid of some equity. This doctrine, however, does not create the equity but aids a pre-existing equity. Hence the universal application of the doctrine to actual settlers upon the public domain under the homestead and pre-emption laws.

However, the status of the selector with the government under the Act of June 4, 1897, presents a different aspect. The government owes him nothing; grants him nothing; undertakes to give him nothing, except an option to exchange lands, under certain conditions, which he may exercise or not at his pleasure or profit. The advantages are all with the selector. He has the whole public domain from which to choose. He may withdraw his proposal to exchange at any time before acceptance. If his first selection is invalid for any reason not his own fault, he may make another, and so on. Now, why should the doctrine of "relation" apply to a lieu selection made under such circumstances? Why, indeed, when, if one selection is rejected he can make

another without losing any rights? According to the statement of counsel for appellant, between the filing of the lieu selection in this case and the action of the Land Department thereon, numerous homestead and timber and stone claimants filed on the land selected. The Land Department thought that said homesteaders and timber and stone claimants were more entitled to equitable consideration than the selector, appellant. What reason is there for a contrary opinion?

In appellant's brief, it is admitted that the local officers at Lakeview Oregon, refused to accept the offer made by appellant "on the ground that by telegram of June 25, 1904, from the Department, the lands had been withdrawn for what is known as the Klamath River project." It was observed that as a result thereof the matter again came before the Secretary of the Interior on May 15 and 18, 1907, in which it was ordered that the said lieu selections be re-instated.

Under the decision of Mr. Justice Lamar in the case of the *United States* v. *Midwest Oil Co. et al.*, with but three members of this Honorable Court dissenting, February 23, 1915, it was held that any attempt to make an entry of any nature or kind upon lands withdrawn by executive order gave no vested rights in the locators. This late case in itself should be decisive of the one before this court, and being so recent as to be within the memory of each member thereof, no attempt will be made to quote therefrom.

Further supplementing the foregoing views, attention is called to *Sjoli* v. *Dreschel* (199 U. S. 564), in which Mr. Justice Harlan, speaking for the court, said:

> "No rights to lands within indemnity limits will attach in favor of the railroad company until after selections made by it *with the approval of the Secretary of the Interior;*
>
> "That up to the time such approval is given, lands within indemnity limits although embraced by the company's list of selections, are subject to be disposed of by the United States or to be settled upon and occupied under the pre-emption and homesteads laws of the United States."

And in *New Orleans Pacific Railway* v. *Parker* (143 U. S. 57), it is observed: "As to lands within the indemnity limits, it has always been held that no title is acquired until the specific parcels have been selected by the grantee, *and approved by the Secretary of the Interior,*" citing numerous authorities.

From the foregoing rules, as announced and followed in the cases mentioned, it is apparent that the offer on the part of appellant to select the certain lands involved herein amounted merely to an offer to purchase said lands or to exchange other lands therefor, provided the United States should agree to accept such selection. There is no rule of law, nor business principle, which would preclude the Government as a landed proprietor from declining to accept the selection at any time. Of course, when the selection is once approved a vested right must necessarily arise, but here the approval is wanting.

The United States as a landed proprietor had merely said to the one offering to exchange or purchase: "We will look into this matter. If your proposition suits us we will accept; if not, then we will not accept."

During the meantime, resolving all doubts in favor of appellant's contention, the appellees settled upon the lands involved, under the law which permitted such settlement, provided such settlement should not meet with the disapproval of the Government. The United States carefully took into consideration all of these circumstances and as a result in substance said to the selectors:

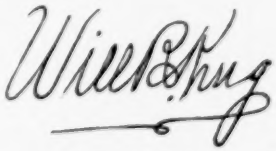
> "True, you in the beginning as an innocent purchaser secured certain scrip and attempted to place it upon certain lands. *When you did this you were presumed to know the law.* You finally discovered that the *law* was against you; that is to say, that the base upon which your scrip was founded was void. Later the State of Oregon, which sold you this scrip, took every reasonable precaution to protect you by shifting your scrip to a proper and legitimate basis and you accepted, after which you concluded to select these particular lands. *You were still presumed to know the law. These particular lands had been withdrawn under an executive order,* which in the light of the recent decision in *United States* v. *Midwest Oil Co.* (February 23, 1915), you could not select. To make a long story short, Mr. Selector, you, under whatever view may be taken of the situ-

ation, found when the question of your selection came up for consideration by the Land Department that there were bona fide residents on the lands, under various acts mentioned in your brief. The law authorizes these settlers, subject to the approval of the Government, to make such settlements. You took your chances on whether the Government would approve your selections or their settlements. The doctrine of "relation," under every well known principles of the law, does not apply to your case. Your right can not attach until after the approval of your selection. We (the Government) have carefully considered all the equities involved in this matter and have concluded to recognize the settlers under the homestead and timber and stone acts, etc. It is within our discretion to decide which to accept, and taking into consideration all the circumstances surrounding these transactions we find that you have acquired no vested rights. Where the equities are equal, justice shall prevail. If, from the mere fact that you have a right under your scrip to select any government land anywhere and at any time or place, you are to be protected as against all other applicants or entrymen, the result to follow is so obviously unjust and absurd as to dissolve the premises upon which your reasoning is based. That is to say, if you have a vested right to any lands which you may select until such time as the Department of the Interior may approve your selections, it must follow that all the unlocated lands within the boundaries of the United States must remain open and not be subject to settlement, occupation or purchase, by anyone, *until after*

> *you* as a scrip owner may determine what particular parcel you may want. To recognize such a policy would be to say that the public domain should remain open for hundreds of years awaiting your pleasure, and that, if during the meantime a claimant under the homestead and timber and stone acts should settle upon the same, he must, regardless of his improvements or any conditions under which he may have settled, surrender the same to the owner of scrip at any time such "scriptor" might demand. The statement of this proposition should be sufficient for its answer. We (the Government) have accordingly accepted and entered of record in the Land Office the applications of the settlers under the homestead and timber and stone acts. Your request is accordingly denied."

From the foregoing statement of the situation, counsel for appellees deem it too clear to admit of doubt that the appellant's selection was properly denied and that the decree of the trial court and of the Court of Appeals should be affirmed.

Respectfully submitted,



Counsel for Appellee.

MARTHA B. CRADDOCK, *et al.*